No. 12,735

United States Court of Appeals

For the Ninth Circuit

H. L. JONES, individually and doing business under the style and trade name of STANDARD SEED FARMS COMPANY,

Appellant,

vs.

THE BARTELDES SEED COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

INTRODUCTION.

The question involved in this appeal is the following:

Where as a part of an oral contract between a seller and a buyer of seed it is expressly stipulated and agreed that the seed shall be Yellow Globe Danvers onion seed "true to type" and where the court finds upon the evidence of the seller's own expert that there is no general custom of the trade disclaiming liability for failure to deliver the type agreed to be delivered, is the seller relieved from liability for failure to deliver seed of the type contracted for and from the consequential damages to the buyer if

(a) there was a printed paragraph in the body of a printed contract not used by the parties or referred to in any way but sent out with a surplus list disclaiming a warranty of description "except as herein otherwise expressly provided"?

(b) After the contract was completely executed the seller writes a letter containing on the letterhead a printed disclaimer of productiveness but not of description?

Appellant has not stated all of the facts; the facts most material to the case have been carefully omitted. No facts have been supported by references to the record—this in direct violation of subdivision 2(f) of rule 20 of this court requiring statements of fact in the argument to be supported "with a reference to the pages of the record".

So that the court may understand the issues the following is a supplementary statement of the facts.

STATEMENT OF FACTS.

Appellant Jones in the course of his business as a seed grower and seller sent a "surplus list", a statement of quantities and varieties of seed for sale, to Appellee Barteldes Seed Co. Included in this list was a quantity of "Yellow Globe Danvers" onion seed. (Pltfs. Exhibit 7, R. pp. 113, 114.)

W. P. Stubbs, manager of the Denver branch of Appellee, having received the list, telephoned Appellant Oct. 19 or Oct. 20, 1943 and an oral contract was en-

tered into during the telephone conversation. (R. p. 49.)

By the terms of this oral agreement Appellant agreed to sell and Appellee agreed to purchase 2,000 pounds of Yellow Globe Danvers Onion Seed at $2.50 per pound. The following was a part of the conversation and contract. Stubbs testified:

> "I told him (Jones) at the time that we only wanted first-class quality stocks of high germination and *true to type,* and he (Jones) assured me that the stocks were first class quality and of high germination."

Nothing was said in this conversation about any limitation of liability or non-warranty or about the possibility of the seed not being Yellow Globe Danvers. (R. p. 50.)

This sale was confirmed by telegram October 20, 1943. This telegram read in part as follows:

> "We confirm telephone purchase from you for prompt shipment by Pacific Intermountain truck following onion seed 20 bags Yellow Globe Danvers 2.50 * * * all onion 90% or better germination fob Stockton net cash. Airmail invoice and will airmail remittance or draft Colorado National if you prefer. (signed) The Barteldes Seed Co." (Pltf. Exh. 5, R. p. 110.)

Also Appellee sent a letter to Appellant confirming the sale dated October 21, 1943. In this letter Appellee again confirmed the purchase and confirmed the wire and said *"We understand that these stocks are all choice-quality stocks true to type."* (Pltfs. Exh. 6, R. pp. 111, 112.)

"Yellow Globe Danvers" is a particular variety and type of onion well known to the seed trade throughout the United States, and uniformly and generally recognized by the seed industry as possessing certain qualities and characteristics. It is impossible of course to recognize or identify the variety or type of onion seed from an examination of the seed itself. This can be determined only by growing the seed. Accordingly a buyer must rely upon the seller's designation, description and representation of variety. (Findings, R. pp. 31, 32; also R. p. 58.)

Thereafter, the seed was shipped and a bill of lading with an "arrival draft" attached was forwarded and the draft was honored and delivery of the seed accepted about October 28, 1943 at Denver. (R. p. 51.)

The seed was relabeled by Appellee and was resold. One of the purchasers, Dutch Valley Growers, planted the seed and when it was grown (as found by the court) "the said (onion) sets shrivelled, sprouted, decayed, kept poorly and did not have the typical characteristic shape or fine and desirable qualities of 'Yellow Globe Danvers' onion or onion set *and in fact was not 'Yellow Globe Onion' or onion set.*" (Findings, R. p. 34.)

Appellee promptly notified Appellant of said complaints and requested Appellant to inspect said onion sets and verify said complaints, which Appellant refused to do. (R. p. 34.)

Thereafter Dutch Valley Growers sued Appellee, Appellant was requested to defend and refused and Appellee was forced to and did defend. Dutch Valley

Growers recovered a judgment. It is for the resultant damages suffered by Appellee Barteldes Seed Co. that this action was brought.

Appellant contended at the trial that because a letterhead of Appellant mailed AFTER the contract was entered into contained a disclaimer of warranty of PRODUCTIVITY, this disclaimer relieved the seller of any obligation to ship goods of the description bought, namely "Yellow Globe Danvers" onions. This disclaimer is printed on the letterhead and is as follows:

> "The Standard Seed Farms Co. give no warranty, express or implied as to the *productiveness** of any seeds we sell and we will not be in any way responsible for the crop." (Pltfs. Exh. 9, R. p. 118.)

This letter was sent and received on October 20, 1943, which, as stated above, was after the contract had been entered into.

Apparently Appellant no longer relies upon this disclaimer which is not mentioned in his brief. Sole reliance is now placed upon an alleged disclaimer made in a printed form of contract included with the so-called "surplus list" which had been sent out to the trade, including Appellee, sometime before the oral contract involved here, was made.

This printed contract-*form* was a proposed agreement to be entered into between Standard Seed Farms Company (Appellant) as Seller and ".....

*Emphasis throughout is ours.

hereinafter called the Purchaser". In this form as paragraph 5 thereof there was printed: *"Except as herein otherwise expressly provided,* the Seller gives no undertaking or warranty, express or implied, as to description, quality, productiveness, or any other matter" etc.

This printed contract-form was never signed by any party, nor is there any contention that it was. The contract between the parties was, as stated above, an oral one made as hereinabove set forth in a telephone conversation. This contract-form was never referred to in the conversation, neither the contract-form as a whole nor the provisions of paragraph 5. In passing it may be noted that the language of the form "except as herein otherwise expressly provided" would imply that it was the custom of the seller to make specific exceptions in other sales from his policy not to warrant his seeds.

Contrary to the statement assumed by Appellant in his brief (without benefit of supporting Record reference) (App. Op. Br. p. 23), there is NO custom or usage of the seed trade in the State of California, or the United States or elsewhere that the seller of seed gives no warranty *as to variety or description.* On the contrary it is true that variety and description of onion seed CAN be controlled and it is known by growers and sellers of seed that it can be controlled. And *"there is no custom or usage of the seed trade * * * disclaiming warranty of variety or description."* (Findings IX, R. p. 37.)

The evidence fully supported this finding. Appellant's own witness, James William Hamilton, an expert called in for that purpose, testified that variety was a factor that could be controlled and known and the court found in accordance with his testimony that there was no custom of non-warranty of description. (Opinion, R. p. 27.)

THE HOLDING OF THE TRIAL COURT.

Under these facts the trial court held:

(1) A "consideration of the basic elements in the creation of a contract" solves the problem presented by this case. (Opinion, R. p. 24.)

(2) It is elementary that where an offer to buy certain goods at a certain price is accepted by a seller a contract is made. (Opinion, R. p. 24.)

(3) The contract "cannot be varied by additional terms or conditions, unless the parties mutually intend to alter the original agreement." (Opinion, R. pp. 24, 25.)

(4) A "disclaimer of warranty coming after the contract was completed is of no effect" and therefore a printed non-warranty clause appearing as a part of a letterhead in a letter sent after the contract was made is not a part of the contract. (Opinion, R. p. 25.)

(5) The agreement to sell "Yellow Globe Danvers" onion seed was an express warranty or condition

that the seed shipped was of that variety. (Opinion, R. p. 25.)

(6) A dealer in such a commodity selling it under that name is charged with notice that the buyer relies upon the description as a representation that it is the thing described. (Opinion, R. pp. 25, 26.)

(7) The manager of Appellee stated when the contract was being made that Appellee wanted only "first class quality stocks of high germination and true to type".

(8) This was not denied. (Opinion, R. pp. 26, 27.)

(9) An express warranty was made that the onion seed would be of the variety ordered. (Opinion, R. p. 27.)

WHERE A SALE OF SEED IS MADE BY DESCRIPTION THERE IS A WARRANTY (OR IT IS A CONDITION) OF THE CONTRACT THAT THE SEED WILL BE OF THE VARIETY SOLD. HENCE A CONTRACT FOR THE SALE OF "YELLOW GLOBE DANVERS" ONION SEED IS BREACHED WHERE ANOTHER VARIETY IS DELIVERED.

Appellee's cause of action is based upon contract and the sole issue here is whether there was a breach of contract. The question of whether the breach was also a breach of warranty, express or implied, or a breach of condition, isn't important. Appellee ordered "Yellow Globe Danvers" onion seed and Appellant breached his contract when he failed to deliver Yellow Globe Danvers onion seed. (Actually the breach was one of condition not warranty.) The goods were sold

by description (this is conceded by Appellant, Appellant's Op. Br. p. 11) and where goods other than goods of that description are delivered there is a breach.

The cases supporting this proposition have been collected and have been the subject of exhaustive annotation in 16 A.L.R. 871, 32 A.L.R. 1243, 62 A.L.R. 453, and 117 A.L.R. 473. In 16 A.L.R. at p. 871 it is said:

> "By the great weight of authority the sale of seed as of a certain kind—in other words a sale by description—constitutes a warranty that the seed is of the variety described, and this is especially true where the sale is by the grower. (The undertaking on the part of the seller is in some jurisdictions regarded as an express warranty, in others as an implied warranty, while in others it is regarded as a condition rather than a warranty.)"

In *Brandenstein v. Jackling,* 99 C.A. 438, 278 P. 880, there was an agreement by the seller to sell "No. 1 long grain Saigon rice". This phrase had a well-known meaning in the trade referring to a specific type and description of rice. The court held that the failure to ship such rice constituted not only a breach of an express warranty but a breach of contract. The court says (on p. 884 of Pac.):

> "The rule that a sale of goods by a descriptive name well known in the trade amounts to an express warranty simply holds one to deliver the goods which he has contracted to deliver. The

appellants' express written agreement to deliver No. 1 Saigon long grain rice would not be performed by the delivery of round grain or No. 2 rice or any other thing not described in the contract. As about 20 per cent. of the bags delivered contained rice of less value than the rice agreed upon, the buyer was entitled to damages for breach of contract. Considering appellants' failure to deliver all No. 1 rice as a breach of contract, instead of a breach of warranty of quality, the judgment appealed from would be equally well supported."

In *Newhall Land and Farming Co. v. Hogue-Kellogg Co.*, 56 C.A. 90, 204 P. 562 (1922), a ranch manager of plaintiff, a farming corporation, called at defendant seed company's warehouse in Ventura and discussed the purchase of "Wilson's improved bush lima beans" a type which could be grown successfully on the kind of land farmed by plaintiff's tenants. The seeds were bought and planted and turned out to be another variety of lima beans not so adapted. The court held (on p. 564 of Pac.):

"Appellant's final contention is that the trial court erred in finding that the defendant guaranteed the seed sold to run true to type. Where an article of a particular variety or type is ordered by name and the seller purports to furnish the same, with or without any express statement that the article furnished is of the kind ordered, a warranty of the identity of the variety or kind arises. Flint v. Lyon, 4 Cal. 17, 21; Burge v. Albany Nurseries Inc., 176 Cal. 313; 168 Pac. 343; Firth v. Richter, 196 Pac. 277; Rauth v. South-

west Warehouse Co., 158 Cal. 54, 60, 109 Pac. 839."

In *Firth v. Richter,* 49 C.A. 545, 196 P. 277 (1920), the buyers ordered Valencia orange trees and the seller undertook to deliver Valencia orange trees. After the trees had been planted and when they commenced to bear, it developed that they were navel orange trees. The court in holding the seller liable for damages says (on p. 279 of Pac.):

> "No charge of bad faith is made herein, but, on the contrary, the court found and the parties admit that there was no such bad faith or deception; nevertheless appellant assumed the responsibility of selling those trees as Valencia orange trees, and there is nothing in the evidence showing any conduct on the part of respondents which would estop them from claiming the benefit of the warranty. The terms used were sufficient to state an express warranty. *Polhemus v. Heiman,* 45 Cal. 573, 578, 579."

See also *Barrios v. Pac. States Trading Co.,* 41 C.A. 637, 639, 183 P. 236, 237; *Poter v. Gestri,* 77 C.A. 578, 247 P. 247.

The case of *Rocky Mountain Seed Co. v. Knorr* (1933), 92 Colo. 320, 20 P. (2d) 304, is in point. There the Plaintiff-in-error was in the retail seed business and the Defendant-in-error bought what she thought was alfalfa seed and what was sold as alfalfa seed but what turned out to be sweet clover. In the invoice there was a disclaimer of description and productiveness which in modified form appeared on the seller's

bags and tags. The seller offered to prove a custom of the trade to refuse to warrant seeds. The trial court refused to receive this evidence and the Supreme Court of Colorado sustained it saying (on p. 305):

> "It will be observed that defendant's contention is not that the delivery was short in quantity, or was lacking in productiveness, or was an inferior kind of alfalfa, or that the crop failed, but rather that on a purchase of alfalfa seed plaintiff made delivery of sweet clover seed. In the circumstances defendant's cause of action is grounded, not on breach of plaintiff's warranty, but for breach of contract to deliver what was purchased."

The *Rocky Mountain Seed Co.* case goes much further than it is necessary to go here. Here there was an express agreement to furnish seed "true to type" and Appellant's own evidence showed there was NO custom of the trade disclaiming a warranty of description.

In *Wallis v. Pratt* (1911) Appeal Cases, England, 394, there was a clause to the effect that the seller gave no warranty, express or implied, as to the growth, description, or any other matter, and the court held that this did not relieve the seller from liability where different variety was furnished than the seed stipulated for in the contract, and the court states:

> "If a man agrees to sell something of a particular description, he cannot require the buyer to take something which is of a different description and the sale or condition by description im-

plies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract then the buyer cannot return it after having accepted it, but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedy applicable to a breach of warranty. That does not mean that it was really a breach of warranty, or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty ab initio but the injured party may treat it as if it had become so and he becomes entitled to the remedy which attaches to a breach of warranty."

To the same effect was the holding in *Black v. B. B. Kirkland Seed Co.,* 158 South Carolina 112, 155 S.E. 268, where the court held that a non-warranty clause could have no application since the pertinent and only question was whether or not the rice seed sold was "abruzzi" as represented by the seller.

The following authorities are also in point:

46 Am. Jur. 566;

55 C.J. 778 (Sales, Sec. 742).

THERE WAS HERE A BREACH OF AN EXPRESS WARRANTY.

As stated above in this case the evidence showed and the court found that there was an express agreement in the telephone conversation wherein the contract between the parties was made that this Yellow

Globe Danvers onion seed was to be "first class stock of high germination *and true to type.*" This, the trial court found was an express warranty.

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon * * *"
>
> (California Civil Code 1732.)

This is a codification in California of Sec. 12 of the Uniform Sales Act. Regarding this section it is stated by Williston on Sales Rev. Ed. 1948, Sec. 194 at pp. 500, 501:

> "The Sales Act makes it clear that an affirmation of fact (that is a representation) is a warranty and not merely evidence of a warranty, if its natural tendency is to induce the buyer to purchase the goods and the buyer thus induced does purchase them."

NO DISCLAIMER OF LIABILITY FOR MISDESCRIPTION CONTAINED IN A PRINTED CONTRACT-FORM MAILED TO THE TRADE PRIOR TO THE CONTRACT AND NOT FORMING ANY PART OF THE CONTRACT ENTERED INTO, AND NO DISCLAIMER OF LIABILITY FOR PRODUCTIVENESS CONTAINED IN A LETTERHEAD OF THE SELLER IN A LETTER MAILED AFTER THE CONTRACT WAS MADE CAN BE RELIED UPON TO ESCAPE LIABILITY.

The court has found here and the evidence would have justified no other finding, that there is in the seed trade no custom or usage disclaiming warranty

of variety or description. The reason for this is obvious. Type and variety can be controlled and are within the knowledge of the seller. As the court found, Appellant's own expert testified that variety was a factor that could be controlled and known. "Therefore the rationale which would be the basis for the custom was lacking." (Opinion, R. p. 27.)

The goods having been described as "Yellow Globe Danvers" onions, there was a warranty that they were of this variety which was implied as well as express.

Appellant actually concedes this in his brief (Appellant's Op. Br. pp. 11 and 12), where he says:

> "The logical effect of a sale of goods by description is brought forth in the California Civil Code, in section 1734, which states: 'that where there is a contract of sale or a sale of goods by description there is an implied warranty that the goods shall correspond with the description."

The sole evidence to which Appellant refers in his brief to support his claim of disclaimer of liability for misdescription of the seeds is a paragraph of a printed contract-form which was included with the "surplus list" sent out to the trade by Appellant prior to the making of this contract. (App. Op. Br. p. 12.)

We have already noted:

(1) There was no mention made of this contract provision in any of the negotiations between the parties; there is no evidence in the record it was ever read by Appellee;

(2) It was not made a part of the contract between the parties;

(3) On its face it implies that exceptions were sometimes made by the seller;

(4) Since the record shows variety is within the grower's control and no custom of the trade involves a disclaimer of variety, no reason would exist for a non-warranty of description.

In this connection it is interesting to note that at the trial Appellant's counsel endeavored by "putting the words in the mouth" of Appellant Jones when he was a witness to get him to testify that there was a custom in the trade to disclaim liability for description. However, after objection to the leading question was sustained and when the question was put without suggestion of the answer it is significant that "productiveness" was the only non-warranty which was specifically mentioned by Jones. (R. p. 83.)

> "A. That was the accepted wording that the seller of these seeds gives no warranty as regards the purity, productiveness, or any other matter connected with the sale of the seed, *the productiveness of the product.*" (R. p. 84.)

We do not believe any citation of authority is required to sustain the proposition that a printed contract-form included in a surplus list sent out by the seller, not shown to have been brought to the attention of the buyer, not entering into or forming any part of the negotiations and not mentioned in the final contract entered into, can not be said to constitute any

part of the contract. To claim the contrary would be a manifest absurdity.

Nor can any greater weight be accorded the disclaimer clause contained in the printed letterhead of the seller in a letter which was mailed out *after* the contract was made.

In the first place, this disclaimer is only a disclaimer of liability for *productiveness.* Description—the obligation to furnish a seed true to type—is not even mentioned in this disclaimer. (R. p. 118.) And the omission of such non-warranty in the disclaimer clause shows actually that far from being the intent of the grower to disclaim liability for description it was his intent to be bound to furnish the type of seed included in the description.

Even had the disclaimer been one of liability for misdescription, coming after the contract was made, it could serve no purpose.

We have already recited the facts in *Newhall Land and Farming Company v. Hogue-Kellogg Co.,* 56 C.A. 90, 205 P. 562 (1922), which facts are so similar to the facts here. There the court says (on p. 565 of Pac.):

> "It is urged by the appellant, however, that * * * there was printed upon stationery of the defendand—and thereby through its correspondence * * * brought to attention of the (plaintiff) that the defendant 'gives no warranty, express or implied, as to description, quality, productiveness or any other matter.' * * *

"But this was after the making of the contract of sale of the seeds and it is held in accordance with elementary principles that the terms of a contract duly entered into cannot be changed except with the concurrence of all parties * * *"

THE CASES CITED BY APPELLANT ARE NOT IN POINT. ALL OF THEM INVOLVE SALES WHERE (1) A DISCLAIMER, OR NON-WARRANTY CLAUSE, WAS MADE AN EXPRESS PART OF THE CONTRACT, OR (2) WHERE THERE WAS A GENERAL CUSTOM OF NON-WARRANTY IN THE TRADE FOUND BY THE FACTS TO EXIST, OR BOTH. NEITHER OF THESE CONDITIONS EXIST HERE.

Appellant has cited a number of cases typical of which are *Ross v. Northrup* (1914), 156 Wis. 327, 144 N.W. 1124, and *Miller v. Germain Seed & Plant Co.* (1924), 193 Cal. 62, 222 P. 817, which hold that an express disclaimer of liability made a part of the contract, or a general custom of the trade not to warrant, will negate the implied warranty of description or productiveness (usually the latter).

Principal reliance is placed by Appellant upon the case of *Miller v. Germain Seed and Plant Co.* (1924), 193 Cal. 62, 222 P. 817. The case is clearly not in point. In the *Miller* case there was evidence of a trade custom disclaiming warranty *as to description* AND productiveness. The seller offered an instruction to the jury which included the following (on p. 818 of Pac.):

"* * * if in this case it should appear from the evidence that there is a general custom or usage of the seed trade that no seeds are warranted as to name, description, productiveness, or other

matter, and if you find from the evidence that such custom is so universal that it must be presumed to have been known by people who have transactions in the seed business, then I charge you that such custom or usage is as much a part of the contract of purchase and sale as if it had been expressly so stipulated."

The trial court had refused to give this instruction and the Supreme Court held this was error. In the *Miller* case there was NO express warranty. The seller had NOT agreed as Appellant Jones agreed here that the seed were "true to type." It was not true there as it is true here that there is NO custom of non-warranty of description. The court says (on p. 818 of Pac.):

"It may be conceded that where a purchaser asks a seed dealer for a certain variety of seed, and in pursuance of that request seed is furnished, in the absence of any additional facts the law will, from the transaction, imply a contract of warranty. This warranty partakes of the nature of both an express and implied warranty. It is express in the sense that it is based upon the express language used by the purchaser in his order or request; it is implied in the sense that results from the circumstance that the request for seed is from a grower of celery to a seller of celery seed for the purpose of raising celery plants, and therefore the character of the seed is an essential and vital provision of the contract between the parties. *It is, of course, conceded that if there had been a written warranty or an expressed oral warranty of the character of the seed, the cus-*

> *tom of the dealer in other cases not to give such a warranty would have no bearing upon the terms of the express warranty.* The question here is somewhat different, namely, whether or not in determining the contract between the parties we should consider, not only the character of the business conducted by the purchaser and by the seller, but also the general custom of seed dealers not to warrant the character of seed sold by them."

Thus the *Miller* case is not authority for Appellant. It is authority for Appellee.

All of the other cases cited by Appellant can be similarly distinguished.

Ross v. Northrup (1914), 156 Wis. 327, 144 N.W. 1124, was a case in which the evidence not only showed but the jury found a general custom of non-warranty; also an express disclaimer was made a part of the contract; and there also the court recognized that had there been there, as there is here, an express warranty of description, no general custom could be proved to contradict it.

Lehnr v. Germain Seed Co. (1924), 192 Cal. 782, 222 P. 843, was a companion case to the *Miller* case, follows it in the reports and the *Miller* opinion is adopted.

William A. Davis Co. v. Bertrand Seed Co. (1928), 94 C.A. 281, 271 P. 123, cited and quoted from by Appellant (App. Op. Br. pp. 15-17) is again illustrative of the distinction between cases where there is an

express warranty and cases where there is an express refusal to warrant negativing an implied warranty. The court points out this distinction in its comment upon the *Miller* case, where it says (on p. 127 of Pac.):

> "In that case, both in the prevailing and dissenting opinion, the rule was conceded, as it is in the case at bar, that 'where a purchaser asks a seed dealer for a certain variety of seed and in pursuance of that request the seed is furnished, that in the absence of any additional facts the law will from the transaction imply a contract of warranty. This warranty partakes of the nature of both an express and implied warranty.' "

Sutter v. Associated Seed Growers (1939), 31 C.A. (2) 543, 88 P. (2d) 144 (cited App. Op. Br. p. 17) did not involve a breach of warranty (or condition) of description. There the question was one of productiveness. There also the provision in a written contract warranting productiveness had been expressly stricken out at the insistence of the seller. It was of course held that the parties by their express contract could negate liability for productiveness.

It is unnecessary to note separately all of the cases cited by Appellant in its brief (App. Op. Br. p. 18) on the question of the validity and extent of agreements containing express disclaimers of non-warranty, or containing proof of findings of general customs negating implied warrants. All of them are distinguishable from the instant case upon the facts noted.

NO QUESTION OF CONFLICT OF LAWS IS PRESENTED HERE. UNDER THE LAW OF ALL JURISDICTIONS THE SELLER IS LIABLE ON THE FACTS OF THIS CASE AND THERE IS NO CONFLICT BETWEEN THE CALIFORNIA LAW AND COLORADO LAW. HOWEVER, THIS CONTRACT WAS PERFORMED IN COLORADO, AND ITS LAW IS APPLICABLE HERE.

The questions presented in this case offer no conflict of laws. We do not know why the Appellant raises, in this court, the contention that the law of California and not the law of Colorado applies. As far as we can see, the rule is uniform that where there is an express agreement to furnish Yellow Globe Danvers onions true to type, the seller is bound by his agreement.

It is true that had there been a disclaimer made by the seller here as a part of his contract, and had there been a custom of the trade shown to disclaim liability for misdescription, then the law of Colorado as embodied in the case of *Rocky Mountain Seed Co. v. Knorr,* 20 P. (2d) 304 is stronger than in some jurisdictions. But as shown above no disclaimer as a part of the contract and no custom exists here; therefore the question of place of performance is academic.

To meet counsel in this argument we would point out that the contract between the parties is to be performed in Colorado and therefore the law of that jurisdiction is applicable.

Restatement of Conflict of Law ALI says:

"Sec. 355. Place of Performance.

The place of performance is the state where, either by specific provision or by interpretation

of the language of the promise the promise is to be performed."

"Sec. 372. Right to Damages and Measure of Damages.

The law of the place of performance determines the right to damages for a breach of contract * * *"

The authorities fully support this rule.

Bertonneau v. S. P. Co. (1917), 17 C.A. 439; 120 P. 53;

Flittner v. Equitable Life Assur. Soc., 30 C.A. 209; 157 P. 630;

Pray v. Trower Lumber Co. (1940), 101 C.A. 482; 281 P. 1036;

Blair v. N. Y. Life Co. (1940), 40 C.A. (2d) 494; 104 P. (2d) 1075;

Hayter v. Fulmor (1944), 66 C.A. (2d) 554; 152 P. (2d) 746;

Monarch Brewing Co. v. Meyer Mfg. Co., 130 F. (2d) 582;

Tuller v. Arnold, 93 Cal. 166; 28 P. 863.

The failure of the performance to deliver Yellow Globe Danvers onion seed ordered by Appellee in this case occurred in Colorado when the seed was delivered to it in Denver after it had paid the draft attached to the bill of lading. The fact appellant paid the freight from California is of no significance in this case, because the title to the seed did not pass to Appellee until the seed was paid for and delivered in Denver.

In *Puritas Coffee & Tea Co. v. DeMartini et al.,* 56 C.A. 628; 206 P. 96, at page 98, the court said:

> "* * * the fact that the bill of lading was made to the order of the plaintiff, with instructions to notify defendants, and that it was forwarded with sight draft attached to a San Francisco bank authorized to deliver to defendants only upon payment of the draft, clearly evidenced an intention on the part of plaintiff to reserve title and possession until payment of the draft. When the terms are cash, title does not pass until payment of the price. *People v. Sing,* 42 Cal. App. 385; 183 Pac. 865, 867; *Katzenbach & Bullock Co. v. Breslauer* (Cal. App.) 197 Pac. 967, 968. And in the absence of an agreement to the contrary, the risk of loss is assumed by the party having the title. *Henderson v. Lauer & Sons,* 40 Cal. App. 696, 698; 181 Pac. 811; *Potts Drug Co. v. Benedict,* 156 Cal. 322, 334; 104 Pac. 432; 25 L.R.A. (N.S.) 609."

It is generally held, where there is a shipment of goods to the seller or order and a sight draft drawn against the buyer for the purchase price is attached to the bill of lading and forwarded for collection, that the seller thereby manifests an intention to preserve his property in the goods, and that title does not pass until the draft is paid. While the cases are concerned primarily with the question of when title passes, the inference is that the title passes at the place of destination, when the draft is paid and the bill of lading is delivered. 60 American Law Reports Annotated, page 677.

Reynolds v. Scott (1884), 2 Cal. Unrep. 334, 4 Pac. 346; *Ramish v. Kirschbraum* (1895), 107 Cal. 659, 40 P. 1045; *Puritas Coffee & Tea Co. v. DeMartini* (1922), 56 C.A. 628, 206 P. 96.

CONCLUSION.

The only other point raised by Appellant, the alleged error in Paragraph III of the Findings of Fact, is without merit. The paragraph is in complete accord with the evidence, no part of the reporter's transcript is cited which negates the facts there found. Actually the fact found is immaterial so far as it relates to the place of delivery.

Dated, Sacramento, California,
May 2, 1951.

Respectfully submitted,
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